Coronavirus – Legal Considerations for U.S. Employers

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As the number of cases of COVID-19 coronavirus ("coronavirus") continues to rise globally, [1] the American workforce is growing more concerned about the virus by the day. As a result, U.S. employers are seeking guidance about what measures they can take to effectively protect their employees and businesses. Before taking action, U.S. employers should be mindful of applicable legal issues when addressing coronavirus in the workplace. The information below is intended to provide a general overview. Employers should consult with counsel before implementing specific policies or responding to issues that arise in their unique workplaces.

Legal Issues U.S. Employers Need to Consider

The Occupational Safety and Health Act

Under the general duty clause of the Occupational Safety and Health Act, employers are required to maintain a safe work environment free from recognized hazards that cause or are likely to cause death or serious physical harm to employees.[2] Although the Centers for Disease Control (CDC) advises that the risk of exposure to coronavirus is currently low for most of the U.S. workforce, and to date the World Health Organization (WHO) has confirmed relatively few cases in the United States, coronavirus could be characterized as a recognized hazard because it can spread through person-to-person contact and may be fatal in some instances. Therefore, U.S. employers have a duty to reduce employees' foreseeable risk of exposure to coronavirus.

In order to meet this duty, U.S. employers should implement general preventative measures, such as providing employees with information on hygiene etiquette and encouraging employees who feel sick to stay home from work. Employers can reinforce this message by circulating official notices from the CDC and local health officials and by maintaining flexible sick leave policies. In addition, the CDC recommends that employees who arrive at work with respiratory illness symptoms such as cough and shortness of breath be separated from other employees and sent home. The CDC recommends that employees remain out of the workplace until they are free of fever, signs of fever, or other symptoms for 24 hours without the use of fever-reducing medication.

It is also critical that U.S. employers assess the risk of exposure to coronavirus in their work environments. Despite the low risk of exposure for most Americans, there is an increased risk in certain industries, such as in healthcare and airline operations, and for persons who have recently traveled to locations that the CDC has recognized as presenting a heightened risk of exposure. The CDC has issued interim guidance to assist businesses and employers with managing their response to the virus ("the interim guidance"). The interim guidance can be found at https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html.

The Americans with Disabilities Act

When implementing a response to coronavirus in the workplace, it is important for U.S. employers to

be mindful that the Americans with Disabilities Act (ADA) limits the type of inquiries U.S. employers can make into an employee's medical status. Specifically, U.S. employers cannot make disability-related inquiries or require employees to undergo medical examinations, unless the employer can show either that (1) the inquiry or medical examination is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a direct threat to the health or safety of themselves or others that cannot otherwise be eliminated or reduced by reasonable accommodation.[3]

Based on guidance from the Equal Employment Opportunity Commission (EEOC) concerning pandemic preparedness,[4] it is unlikely that coronavirus itself currently poses a direct threat under the ADA because the risk of exposure and infection is relatively low in the U.S. and the WHO has not yet declared coronavirus to be a pandemic. Therefore, at this time, U.S. employers likely cannot implement broad policies and requirements, such as restricting employees from all types of travel or requiring all employees to have their temperatures taken before entering the workplace. However, U.S. employers should assess whether an individual employee potentially poses a direct threat in the workplace based on guidance from government and public health officials and the employee's risk of exposure. For example, if an employee travels to an area the CDC has deemed to be a high-risk area or comes in contact with an infected person, U.S. employers may require an employee to work remotely, if possible, for up to 14 days following the potential exposure to coronavirus. If an employee holds a position that cannot be performed remotely, the employer should consider whether to require the employee to take leave in order to complete a period of self-monitoring as recommended by the CDC.

Employee Leave Laws

The Family and Medical Leave Act (FMLA) entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave due to their own or a family member's serious health condition. Typically, influenza and common cold, standing alone, do not qualify an employee for FMLA *unless* the illness meets specific criteria for a "serious health condition" as defined by the statute. Thus, employees with coronavirus or employees who are taking care of a family member with coronavirus may, in certain circumstances, be entitled to use protected FMLA leave. An employer cannot, however, require asymptomatic employees without a confirmed case of coronavirus to draw down their FMLA leave entitlement during a period of self-monitoring imposed by the employer. In addition, under the Massachusetts Earned Sick Time Law employers must allow eligible employees to take available sick time to care for an ill family member.

Irrespective of the requirements of employee leave laws, it is important to note that the interim guidance encourages U.S. employers to ensure their sick leave policies are flexible and consistent with public health guidance to encourage employees who are sick or at risk of developing coronavirus to remain out of the workplace.

Suggested Practices for Employers

Travel Restrictions and Policies

U.S. employers should consider cancelling business travel to high risk areas. In doing so, it is important to enforce travel restrictions uniformly based on objective criteria. For example, an employer might consider cancelling all business travel to locations for which the CDC has issued a Level 2 Warning or

higher based upon the assessed risk of community transmission. With respect to employees' personal travel, U.S. employers may recommend against traveling to areas where there is a high risk of exposure to coronavirus as determined by the CDC and may also require employees to provide advance notice of their travel plans so that the employer can assess the risk of exposure in the workplace. If an employee is traveling to a known high-risk area, then it would be reasonable for a U.S. employer based upon CDC recommendations to require the employee to stay out of the office for up to 14 days after the employee returns from the high-risk area and to monitor his or her health during the 14-day period. If an employee remains asymptomatic, then the CDC recommends at this time that U.S. employers allow the employee to return to work without requiring the employee to provide medical clearance.

For more information and travel advisories, U.S. employers should visit the CDC's webpage at https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html.

Other Strategies

If any employee is experiencing fever and respiratory symptoms, according to the CDC, U.S. employers should send the employee home and require the employee to remain out of the office until the employee has been fever free, without the use of fever-reducing medicine, for at least 24 hours. If an employee is experiencing symptoms and has an increased or high risk of exposure to coronavirus, then U.S. employers should weigh the risks and benefits of requiring additional medical clearance from a doctor certifying he or she is fit to return to work. Any medical information that an employer does obtain should be kept in the employee's confidential medical file maintained by a Human Resources professional.

Because coronavirus has not yet been declared a pandemic, at this time the ADA limits an employer's ability to require employees to undergo medical examinations as a preventative measure for curbing the potential spread of coronavirus in the workplace. This includes taking and recording employees' temperatures, even by non-invasive procedures, such as thermal imaging.

Policy Considerations

As discussed above, U.S. employers are encouraged to maintain flexible sick leave policies. U.S. employers should be reviewing their policies to prepare for a potential widespread outbreak of the virus and to determine whether employees will be paid while on leave or during periods of self-monitoring.

The EEOC has opined that remote work is an effective measure for preventing and controlling exposure to infection. Therefore, U.S. employers should encourage employees who are experiencing symptoms to work remotely until at least 24 hours after the employee is fever free without the use of fever-reducing medicine. Additionally, the EEOC stated that working remotely is a reasonable accommodation for employees with disabilities who are at a high risk for complications related to pandemic influenza. It is important to note that implementing such a remote work policy may establish a precedent for whether telecommuting is a reasonable accommodation for the positions at issue.

U.S. employers should ensure that policies or measures they do decide to take are consistently applied to avoid possible discrimination claims. All policies and actions should be applied equally to all

workers in order to ensure that they do not have a disproportionate negative impact on a protected class or classes.

Prepare for Possible Pandemic

Although coronavirus has not yet been classified as a pandemic, the CDC warns that the virus may become one in the future. Employers should begin to plan now for potential business interruption that could result from high incidences of exposure or potential school and transit closures.

If the WHO does declare a pandemic, and the CDC or local health officials determine that the pandemic is significantly more severe or widespread, then coronavirus would likely pose a "direct threat" under the ADA. As such, the assessment by the CDC or local health officials would support the need for more proactive intervention by employers, including medical examinations and expanded requests for medical documentation. Accordingly, U.S. employers must continue to monitor communications from public officials about the situation to be sure they are ready in the event of a pandemic. More information designed to assist employers with managing their workforce before and during a pandemic can be found at https://www.eeoc.gov/facts/pandemic_flu.html.

As the coronavirus outbreak continues to progress, the information and recommendations contained herein may change. Employers are encouraged to contact an attorney in Peabody & Arnold LLP's Employment Law and Litigation Practice Group with any questions or for advice on this evolving issue.

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[1] Up to date situation reports from the World Health Organization can be found at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/.

[2] 29 U.S.C. § 654(a)(1).

[3] 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.2(r).

[4] https://www.eeoc.gov/facts/pandemic_flu.html. Although coronavirus has not yet been declared a pandemic, EEOC's pandemic guidance offers insight for employers as they develop strategies for responding to the virus.

